

DEPARTMENT OF STATE REVENUE

04-20130652.LOF

Letter of Findings Number: 04-20130652
Use Tax
For Tax Years 2010-12

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUE**I. Use Tax—Imposition.**

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-8; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the assessment of use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana retail business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on some items which it used in the course of its business during the years 2010-12. The Department therefore issued proposed assessments for use tax, penalty, and interest for those years. Taxpayer protested the imposition of use tax on some items which it purchased. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented as required.

I. Use Tax—Imposition.**DISCUSSION**

Taxpayer protests the portion of the proposed use tax assessments related to its purchase of televisions during the tax years 2010, 2011, and 2012. The Department reviewed Taxpayer's documentation and determined that Taxpayer owed additional use tax on some purchases it made during those years. At issue in Taxpayer's protest is the Department's determination that Taxpayer was giving televisions ("TVs") away as promotional items to its customers during certain sales events. Taxpayer protests that it did charge its customers for the price of the TVs and that it did collect and remit sales tax on the sales of the TVs. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property ("TPP") is used, stored, or consumed in Indiana, use tax is due unless

sales tax was paid at the time of the transaction, or if there is an applicable exemption to sales and use taxes.

Also of relevance is IC § 6-2.5-5-8(b), which states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

In the instant case, Taxpayer occasionally held sales events which included a "Free TV" with certain purchases or when a customer spent a certain dollar level during the event. The Department concluded that Taxpayer was using the TVs in the course of its business as promotional items, but that Taxpayer had neither paid sales tax at the time of purchase nor remitted use tax on those purchases. The Department therefore imposed use tax on the purchase and use of the TVs.

Taxpayer protests that, despite the use of the term "Free TV", it did charge its customers for the TVs and also collected and remitted sales tax on those sales. In the course of the protest process, Taxpayer was able to provide copies of invoices for sales to its customers which included the "Free TV" promotion. This documentation establishes that Taxpayer did in fact charge its customers for the TVs and that sales tax was collected on the amounts charged for the TVs. Therefore, Taxpayer did purchase the TVs for resale and so those purchases were exempt for Taxpayer under IC § 6-2.5-5-8(b). Since the purchases were exempt from sales tax for Taxpayer and since Taxpayer resold the TVs and collected sales tax on the sales to its customers, no use tax is due from Taxpayer on the TV purchases in question. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

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